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No. 07-1114

In The Supreme Court of the United States

GARY BRADFORD CONE,

Petitioner,

v.

RICKY BELL, WARDEN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF RESPONDENT

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CAPITAL CASE
QUESTIONS PRESENTED

I.

Whether Cone's *Brady* claim is procedurally defaulted.

II.

Whether Cone's *Brady* claim is, in any event, without merit.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 492 F.3d 743. (Pet. App. 6a) The memorandum opinion of the United States District Court for the Western District of Tennessee relevant to Cone's *Brady* claim is unreported. (Pet. App. 86a)

JURISDICTION

The judgment and opinion of the court of appeals were entered on June 19, 2007. (Pet. App. 6a) The court denied rehearing on September 26, 2007. (Pet. App. 1a) By order entered December 11, 2007, Justice Stevens extended the time for filing a petition for writ of certiorari from December 25, 2007, until February 23, 2008, a Saturday. Cone filed a petition for writ of certiorari on Monday, February 25, 2008. This Court granted the petition on June 23, 2008. Jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2254(b) provides in pertinent part:

> (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

STATEMENT OF THE CASE

1. On August 10, 1980, Gary Cone forcibly entered the Memphis home of 93-year-old Shipley O. Todd and his 79-year-old wife, Cleopatra. When the Todds, in Cone's words, "ceased to cooperate" with him (R. 4, Add. 1, Doc. 1, Vol. 15, p. 1681),[1] Cone beat them both to death with a blunt object, probably a pistol. (R. 4, Add. 1, Doc. 1, Vol. 13, pp. 1293, 1295-96, 1298-1300) After moving their bodies to positions not visible from outside the house, Cone ransacked their

[1] References to the state-court record are denoted by citation to the addendum, volume, and page numbers set forth in respondent's Notice of Filing Documents, filed in the district court on February 13, 1997, and docketed as Record Entry 4. *Cone v. Bell*, No. 2:97-cv-2312 (W.D.Tenn.).

belongings in search of money, placed a long-distance call from their home telephone to his sister in Chicago, altered his appearance to avoid detection, and booked a flight to south Florida, where he was arrested four days later using the alias, Gerald Mason Harmon.

The brutal murders of the Todds were the climax of a crime spree that began on August 9, 1980, when Cone robbed a jewelry store in Memphis of approximately $112,000 in merchandise. The jewelry store manager gave a description of the suspect to police, and an officer in an unmarked police car spotted Cone driving his vehicle a short time after the robbery and pulled in behind him. A high-speed chase ensued through mid-town Memphis and into a residential neighborhood, where Cone abandoned his automobile and proceeded on foot. As he fled from police, Cone shot one of the police officers who attempted to arrest him, shot a citizen who challenged him, pulled a gun on a third person, and demanded that the latter give Cone his automobile. When the owner of the automobile fled, Cone attempted to fire his pistol several times, but the ammunition in the weapon was spent. *State v. Cone*, 665 S.W.2d 87, 90 (1984).

Cone managed to elude police on August 9th but appeared at the door of a home in the same neighborhood early the next morning and asked to use the phone. When the elderly resident, Lucille Tuech, refused him admittance, Cone drew his pistol and pointed it at her. Ms. Tuech quickly slammed the door, ran to another part of the house, and called the

police. *Id.* (R. 4, Add. 1, Doc. 1, Vol. 12, pp. 1207-08) Later that same afternoon, Cone broke into the home of the Todds, who lived a short distance from Ms. Tuech. The couple's bodies were found "horribly mutilated and cruelly beaten" three days later after authorities were alerted by anxious relatives. *Cone*, 665 S.W.2d at 90. Mr. Todd sustained 16 blows, mostly to the back of the head, and Mrs. Todd sustained 22 blows to the back and left side of the head; defensive wounds were present on the hands of both. Cone's fingerprints, palm prints, and hair were found in the Todds' home, which had been ransacked. He was apparently able to steal enough money from their home to fly from Memphis to Florida, where he appeared at the home of an acquaintance on August 12. *Cone*, 665 S.W.2d at 90.

When police processed Cone's abandoned car, they recovered a large quantity of drugs and drug paraphernalia, including four bags of marijuana, 14 marijuana cigarettes, two marijuana cigarette butts, one pipe, and two bottles of marijuana seed, among other items. (R. 4, Add. 1 Vol. 14, p. 1505) In addition, police recovered a considerable amount of narcotic drugs, including five vials of Morphine Sulfate (one opened), four vials of Demerol Meperidine (½ full), two vials of Codeine S Phosphate, 13 vials of Leritine, five bottles of Dolophine Hydrochlorine containing a total of 465 tablets, two bottles of Percodan containing a total of 464 tablets, five bottles of Seconal Sodium containing a total of 469 tablets, five bottles of Nembutal Sodium containing a total of 500 tablets,

two bottles of Demerol containing a total of 182 tablets, four bottles of Tuinol containing a total of 402 tablets, four bottles of Amytal containing a total of 299 tablets, one bottle of Codeine Sulfate containing 55 tablets, eight bottles of Dexamyl containing a total of 462 capsules, 13 bottles of Dexedrine containing a total of 545 capsules, one bottle of Eskatrol containing 23 capsules, five bottles of Ritalin containing a total of 1126 tablets, one bottle of Benzedrine containing 102 tablets, one bottle of Coumadin containing one tablet, one bottle of Serpasil containing seven tablets, one box of Desoxyn containing 10 tablets, one box of Percocet containing one tablet, and one bottle of Preludin containing 50 tablets. Police also recovered assorted empty bottles and drug paraphernalia, six packs of insulin syringes and seven loose insulin syringes. (R. 4, Add. 1, Doc. 1, Vol. 14, p. 1505-09) At trial, the State theorized that Cone's possession of this quantity and variety of drug items – four bags of marijuana, 24 vials of four different narcotic drugs, and 5,163 tablets consisting of 18 different narcotics in 61 separate containers – demonstrated that he was a drug dealer, arguing in closing that Cone "had a drug store in [his] car." (R. 4, Add. 1 Vol. 18, p. 2016) Cone argued that he was addicted to drugs and, at the time of the murders, was simply a "junkie out of control." (R. 4, Add. 1, Doc. 1, Vol. 18, pp. 2060-62)

Although he admitted killing the Todds and committing the other crimes charged, Cone claimed that he was insane or lacked the requisite mental capacity to commit the offenses due to drug abuse

and stress arising out of his military service in Vietnam 11 years earlier. On direct appeal, the Tennessee Supreme Court found that the evidence "was overwhelmingly sufficient to sustain [Cone's] conviction on all charges." *Id*. at 91. Likewise, this Court noted that the State presented "near conclusive proof of guilt on the murder charges as well as extensive evidence demonstrating the cruelty of the killings of two elderly persons in their home." *Bell v. Cone*, 535 U.S. 685, 699 (2002).

Cone presented the testimony of two expert witnesses to support his defense that he was insane at the time of the murders. Matthew Jaremko, a clinical psychologist, opined that Cone suffered from two interrelated disorders: a substance-abuse disorder and post-traumatic stress disorder. The substance-abuse disorder was caused primarily by post-traumatic stress disorder, which arose from Cone's exposure to combat trauma in Vietnam and his continuing trauma after returning home as a veteran of an unpopular war. (R. 4, Add. 1, Doc. 1, Vol. 15, p. 1670) According to Jaremko, Cone's post-traumatic stress disorder manifested itself over the years in the form of flashbacks, nightmares, depression, nervousness, and sleep disorders. (R. 4, Add. 1, Doc. 1, Vol. 15, pp. 1671-72) Dr. Jaremko testified that, in his opinion, Cone was suffering from a mental illness in August 1980, which rendered him incapable of conforming his conduct to the requirements of the law. He further testified that Cone had expressed remorse

for what had happened. (R. 4, Add. 1, Doc. 1, Vol. 15, pp. 1674-75)

Jonathan Lipman, a neuropharmacologist, testified that he had examined Cone and detailed his history of drug abuse. Dr. Lipman testified that Cone claimed to have had no history of drug abuse until the age of 18, when he was first exposed to hashish while serving in the Army in Germany. He was later introduced to opium and amphetamines while serving in Vietnam, where he said he was issued amphetamines for 53 consecutive nights to maintain alertness while on guard duty. (R. 4, Add. 1, Doc. 1, Vol. 16, p. 1724) According to Dr. Lipman, that pattern of amphetamine use continued throughout the rest of Cone's history. Dr. Lipman opined that in August 1980, Cone was suffering from chronic amphetamine psychosis, which prevented him from knowing the wrongfulness of his acts and rendered him substantially incapable of conforming his conduct to the requirements of the law. (R. 4, Add. 1, Doc. 1, Vol. 16, p. 1758)

In rebuttal, the State called Ilene Blankman, a resident of Key West, Florida, who had been acquainted with Cone between March and August 1980. She testified that she saw Cone in the early morning hours of August 12, 1980, two days after the murders in Tennessee. Blankman allowed Cone to stay at her apartment that night. The next day, Cone told Blankman that he had lost his wallet and needed to obtain another driver's license. She accompanied him while he obtained a voter registration card as

identification for a replacement license. Cone then studied for and passed the written and driving tests necessary to obtain a new driver's license. (R. 4, Add. 1, Doc. 1, Vol. 17, pp. 1880-82) Blankman did not observe any drug usage or aberrant behavior by Cone at that time. (R. 4, Add. 1, Doc. 1, Vol. 17, p. 1883)

FBI Agent Eugene Flynn interviewed Cone on August 14, 1980, at the Broward County Jail in Pompano Beach, Florida. Cone admitted shooting a police officer and robbing a jewelry store in Memphis but denied murdering the Todds. (R. 4, Add. 1, Doc. 1, Vol. 17, p. 1910-11, 1912, 1921) He stated that he could be positively identified by witnesses and by property he had abandoned in Memphis and stated that he had assumed the name "Harmon" to avoid detection. (R. 4, Add. 1, Doc. 1, Vol. 17, p. 1913, 1920-21) Cone indicated that, aside from drug withdrawal, he had no physical or mental problems, and he admitted using cocaine, dilaudid, and demerol. (R. 4, Add. 1, Doc. 1, Vol. 17, p. 1910-11, 1912, 1921) Cone discussed with Agent Flynn his educational background, including a college degree, and stated that he was about to enter law school. Agent Flynn testified that Cone was mentally alert, able to give details of his recent travels, and was aware of his surroundings. (R. 4, Add. 1, Doc. 1, Vol. 17, p. 1916-20)

Memphis police officer Ralph L. Roby saw Cone in Florida on two occasions following Cone's arrest. On August 18, 1980, it was necessary for Cone to completely disrobe while Roby took hair samples from

him. Roby observed no needle marks on Cone's body at that time. (R. 4, Add. 1, Doc. 1, Vol. 17, p. 1939)

Dr. Ben Bursten, a forensic psychiatrist, who examined Cone on January 20, 1982, found nothing to support a finding of post-traumatic stress syndrome. Nor did he find any evidence that, in August 1980, Cone had been suffering from any mental disease or defect or was unable to understand the wrongfulness of his acts or conform his behavior to the requirements of the law. (R. 4, Add. 1, Vol. 17, p. 1956-57) Likewise, Dr. John R. Hutson, a clinical psychologist who had examined Cone in January and February 1982, concluded that Cone was not suffering from a mental disease or defect and had the capacity both to conform his conduct to the requirements of the law and to appreciate the wrongfulness of his conduct. (R. 4, Add. 1, Doc. 1, Vol. 17, p. 1983)

The jury rejected Cone's insanity defense and convicted him at the conclusion of the guilt phase of two counts of first degree murder, three counts of assault with intent to commit first degree murder and robbery by use of a deadly weapon. *Cone*, 665 S.W.2d at 89-90. A bifurcated sentencing hearing before the same jury followed.

The State established at the hearing that Cone had three prior convictions for robbery with a firearm, for offenses occurring on December 28, 1971, March 7, 1972, and May 22, 1972, for which he

received prison sentences of 25 years each.[2] (R. 4, Add. 1, Doc. 1, Vol. 20, pp. 2120-21, Vol. 21, Tr. Exh. 71) In addition, the State recalled at the sentencing hearing two Memphis police officers who had been involved in the initial efforts to apprehend Cone after the jewelry store robbery. Both officers testified that Cone evaded arrest. (R. 4, Add. 1, Doc. 1, Vol. 20, pp. 2128-32) Defense counsel presented no direct evidence in mitigation, but explained to the jury that it could rely upon mitigating evidence presented during the guilt phase of the trial. In addition, on cross-examination of the records custodian through whom proof of Cone's prior convictions was introduced, defense counsel elicited information suggesting that Cone had been awarded a Bronze Star for his military service in Germany and Vietnam and was honorably discharged from the United States Army in July 1969.[3] (R. 4, Add. 1, Doc. 1, Vol. 20, pp. 2123-24)

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[2] Cone was in prison for the Oklahoma robberies from 1972 to 1979. (R. 4, Add. 1, Doc. 1, Vol. 16, p. 1650)

[3] This information was derived from a notation contained in a Classification Summary from Oklahoma Department of Correction (ODOC) records, which stated that Cone had been awarded a Bronze Star for service in Vietnam and was honorably discharged from the United States Army in July 1969. (R. 4, Add. 1, Doc. 1, Vol. 20, pp. 2123-24) This was the first mention of a Bronze Star award at any point in Cone's trial despite the fact that the entire defense turned on his Vietnam experience. Neither defense counsel nor any witness at trial, including all four mental health experts who had questioned Cone about his military service in connection with his mental health defense, indicated that Cone had reported receiving any such award. At

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The jury returned verdicts of death for each of the two murders, finding that the State had proven four aggravating circumstances beyond a reasonable doubt: (1) that Cone was previously convicted of one or more felonies, other than the present charge, involving the use or threat of violence to the person; (2) that Cone knowingly created a great risk of death to two or more persons, other than the victim murdered, during his act of murder; (3) that the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind; and (4) that the murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another. Tenn. Code Ann. §§ 39-2-203(i)(2), (3), (5), and (6) (1975 & Supp. 1980). The jury further found no mitigating circumstances sufficiently substantial to outweigh those aggravating circumstances. (R. 4, Add. 1, Doc. 1, Vol. 20, pp. 2223, 2225) The Tennessee Supreme Court affirmed Cone's convictions and sentences on direct appeal (Pet. App. 84),[4] and this Court denied

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the post-conviction hearing, defense counsel testified that the award was not listed on Cone's military discharge document, Form DD 214. (R. 4, Add. 2, Doc. 1, Vol. 2, p. 101) The source of the ODOC record notation is unknown. However, a search of the online database maintained for public access by the U.S. National Archives and Records Administration does not show that Cone ever received any such award. *See* U.S. National Archives, Access to Archival Databases, URL: http://aad.archives.gov/aad/index.jsp.

[4] The Tennessee Supreme Court found that the aggravating circumstance under Tenn. Code Ann. § 39-2-203(i)(3) (risk of

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certiorari. *Cone v. Tennessee*, 467 U.S. 1210 (1984). Cone raised no claim in his direct appeal that prosecutors withheld exculpatory evidence, and the Tennessee state courts did not address that issue.

2. Cone initiated his first state post-conviction proceeding in June 1984. He asserted nine grounds for relief, including ineffective assistance of counsel, prosecutorial misconduct related to allegedly improper argument at the guilt stage of trial, sufficiency of the evidence of guilt, instructional error at sentencing, and various challenges to Tennessee's death penalty statute and procedures. The trial court denied relief following an evidentiary hearing, and the Tennessee Court of Criminal Appeals affirmed. He did not raise any claim that prosecutors withheld exculpatory evidence, and the Tennessee state courts did not address the issue. (R. 4, Add. 2, Doc. 1, Vol. I, pp. 27-29, 48-54, 105-10) *Cone v. State*, 747 S.W.2d 353 (Tenn. Crim. App.), *cert. denied*, 488 U.S. 871 (1988).

Cone filed a second petition for post-conviction relief in June 1989, asserting multiple grounds of ineffective assistance of counsel, instructional error at the sentencing stage of trial, prosecutorial misconduct

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death to two or more persons) was inapplicable to an extended criminal episode, such as the one here. But because the jury clearly found three other aggravators, the Court found that any error with respect to the (i)(3) circumstance was harmless beyond a reasonable doubt. *Cone*, 665 S.W.2d at 95. (Pet. App. 98-99)

related to allegedly improper argument at the guilt stage of trial, trial court error, and various challenges to Tennessee's death penalty statute and procedures. (R. 4, Add. 3, Doc. 1, pp. 26-35) The trial court summarily dismissed the case without appointment of counsel after finding that all of the claims raised had been previously litigated or were waived by Cone's failure to raise them in his first post-conviction proceeding. However, the Tennessee Court of Criminal Appeals reversed, holding that a remand was necessary to provide Cone an opportunity to overcome the presumption of waiver arising from the previous proceedings.[5] *Cone v. State*, No. 48, 1991 WL 77535 (Tenn. Crim. App. 1991) (perm. app. denied Aug. 24, 1992).

On remand, the trial court appointed post-conviction counsel, who filed an amended petition on August 13, 1993. (R. 4, Add. 4, Doc. 1, p. 64) In his amendment, Cone asserted 23 grounds for relief, including a claim of ineffective assistance of counsel with 34 sub-parts, 15 separate challenges to guilt-phase jury instructions, 8 challenges to sentencing-phase jury instructions, 18 instances of trial court error, and 15 separate challenges to Tennessee's

[5] Tenn. Code Ann. § 40-30-112(b)(2) (1990) created a rebuttable presumption of waiver as to a ground for relief raised in a second or subsequent post-conviction petition where the petitioner failed to present it for determination in any proceeding before a court of competent jurisdiction in which it could have been presented.

death penalty statute. Among this litany of claims, Cone asserted the following generalized *Brady* claim:

> 35. The State violated petitioner's rights under Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§ 7, 8, 9 and 16 of the Tennessee Constitution by failing to provide petitioner material exculpatory evidence including *evidence concerning absence of forced entry which negated burglary, concerning contradictory statements made by eyewitnesses, and any and all information concerning State witness Ilene Blankman* which demonstrated that she received consideration for her testimony and/or testified falsely concerning facts related to petitioner and his drug use.

(R. 4, Add. 4, Doc. 1, p. 81) (emphasis added) (J.A. 13-14)

As cause for failing to raise his claims earlier, Cone included in his petition a catch-all paragraph encompassing all 90 of his allegations:

> 39. The above claims were not raised previously either due to the law regarding the claim not being established at the time, ineffective assistance of counsel, the novelty of the claim, or counsel's failure to apprise petitioner of the claim or its relevance to the case. Because of this, the petitioner himself has never had an opportunity before now to either raise these claims or waive them. Neither petitioner nor any person previously appointed to represent petitioner has

> knowingly and understandingly failed to raise any and all such claims earlier.

(R. 4, Add. 4, Doc. 1, p. 81)

In response, the State first argued that "[m]any of Petitioner's claims have been previously determined on appeal of the trial." The State then attempted to parse the numerous claims and sub-parts of Cone's amendment to identify those claims decided in the previous two proceedings. As to paragraph 35, the State argued that it "appears to be the same as that found on page 94 of [Cone's direct] appeal." (R. 4, Add. 4, Doc. 1, p. 108-09) (J.A. 15-16) On October 15, 1993, Cone filed another amendment to his post-conviction petition. Picking up at paragraph 41, Cone added 11 new claims, including:

> 41. Petitioner was denied his rights under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article 1, Sections 6, 7, 8, 9, 10, 11, 14, 16 and 17 of the Tennessee Constitution, because the State withheld exculpatory evidence which demonstrated that *petitioner did in fact suffer drug problems and/or drug withhdrawal or psychosis both at the time of the offense and in the past*, such evidence including, but not limited to, *statements of Charles and Debbie Slaughter, statements of Sue Cone, statements of Lucille Tuech, statements of Herschel Dalton, and patrolman Collins,* and other persons unknown at this time, such statement contained in official police reports, and/or contained in other

> documents unknown and/or through personal recollections of officers or others. Such evidence was highly exculpatory and exculpatory to both the jury's determination of petitioner's guilt and its consideration of the proper sentence. There is a reasonable probability that, had the evidence not been withheld, the jurors would not have convicted petitioner and would not have sentenced him to death.

(R. 4, Add. 4, Doc. 1, p. 139) (emphasis added) (J.A. 20-21)

As cause for failing to present the additional claims earlier, Cone contended that the absence of funding for expert witnesses in his first post-conviction proceeding had denied him the opportunity to present the claims at that time. (R. 4, Add. 4, Doc. 1, pp. 143-44)

On October 15, 1993, Cone submitted a reply to the State's response to "clarify any possible confusion" concerning why he had not waived the claims submitted for the first time in his second post-conviction proceeding. (R. 4, Add. 4, Doc. 1, pp. 146-52) In it, he advanced three general reasons for failing to raise his new claims earlier: (1) inadequate consultation and communication and ineffective assistance of previous post-conviction counsel; (2) inability to fully investigate and/or develop the facts underlying any claims not purely legal in nature because of his lack of access to the full record of the case due to Cone's incarceration and indigent status; and (3) lack of legal knowledge and acumen necessary to properly and fully

raise his claims previously because Cone is not an attorney. (R. 4, Add. 4, Doc. 1, pp. 150-51) He did not assert that the documents supporting his *Brady* claim had only become available during his second post-conviction proceeding.

On November 12, 1993, Cone filed yet another amendment to his petition, arguing at length that he had not *personally* made a knowing and understanding waiver of any of the claims asserted in his second post-conviction proceeding. There, Cone argued again that the claims were not waived "because, *inter alia*, he was unaware of such claims in earlier proceedings, due either to the unavailability of the factual predicate of such claims, had no knowledge of the legal standards governing his case, and/or the failure to be apprised of the significance, and because he had no understanding that failure to raise such claims would constitute a waiver." (R. 4, Add. 4, Doc. 1, p. 170) On December 10, 1993, Cone submitted a 41-page affidavit on the waiver question. Two paragraphs out of the 71-paragraph affidavit referenced the paragraph numbers corresponding to Cone's *Brady* claim. As to paragraph 35, he stated:

> ¶ 35. I did not know the existence of this claim in earlier proceedings, including post-conviction proceedings. During those proceedings, I did not know the facts or legal significance of any facts concerning Ilene Blankman and the State's duty to provide exculpatory evidence, nor did either trial or appellate or post-conviction counsel after full

> investigation and full disclosure discuss the significance of such matters with me and the significance or viability of this claim. Being incarcerated, indigent, and without the benefit of the record in this matter, I also had no ability to investigate or develop facts relevant to such claim. Had I known the facts underlying such claim, the legal significance of such fact, and the governing law, I would have presented such claim in earlier proceedings. Had I understood that I needed to raise this claim in earlier proceedings, I would have done so, had I known about this claim. I have never made a deliberate, informed, considered, tactical choice not to present this claim earlier. I have not knowingly or understandingly or intelligently or deliberately failed to present this claim in earlier proceedings.

(R. 4, Add. 4, Doc. 1, pp. 205-06)

As to paragraph 41, he stated:

> ¶ 41. I did not know of the existence of this claim in earlier proceedings, including post-conviction proceedings. During those proceedings, I did not know the facts nor the legal significance of any facts concerning the State's withholding of evidence, nor did either trial or appellate or post-conviction counsel after full investigation and full disclosure discuss the significance of such matters with me and the significance or viability of this claim. Being incarcerated, indigent, and without the benefit of the record in this

> matter, I also had no ability to investigate or develop facts relevant to such claim. Such facts have been revealed through disclosure of the State's files, which occurred after the first post-conviction proceeding. I have never seen those files. Had I known the facts underlying such claim, the legal significance of such facts, and the governing law, I would have presented such claim in earlier proceedings. Had I understood that I needed to raise this claim in earlier proceedings, I would have done so, had I known about this claim. I have never made a deliberate, informed, considered, tactical choice not to present this claim earlier. I have not knowingly or understandingly or intelligently or deliberately failed to present this claim in earlier proceedings.

(R. 4, Add. 4, Doc. 1, pp. 206-07) (J.A. 17-18)

On December 16, 1993, the trial court entered judgment denying relief and dismissing Cone's petition. (R. 4, Add. 4, Doc. 1, p. 217) After reciting the procedural history of the case, the trial court declined to review the merits of any of the grounds raised in Cone's petition, citing the Tennessee statutory provision barring consideration of grounds for relief that have been waived or previously determined. (R. 4, Add. 4, Doc. 1, p. 219) As to paragraph 35, the trial court stated that "[g]rounds 17, 18, 19, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, and 36 involve[ ] a potpourri of errors by the court at the trial all of which grounds have been considered and denied

in direct appeal or the first Post Conviction Petition." (*Id*., p. 219) As to paragraph 41, the trial court ruled:

> Petitioner, by way of his Third Amendment, continues with grounds 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51 and 52 all of which grounds are clearly re-statements of grounds heretofore determined and denied by the Tennessee Supreme Court upon Direct Appeal or the Court of Criminal Appeals upon the First Petition.

(*Id*., p. 223) (J.A. 22) The trial court's most detailed analysis involved its rejection of Cone's waiver argument set forth in paragraph 39 of the amended petition:

> [Cone's] explanation to rebut the presumption of waiver under T.C.A. 40-30-112(2) fails as a matter of law to state a reason why [he] should not be held to have waived any ground or grounds, if any there be, not previously presented or could have been presented on direct appeal or by the First Petition for Post Conviction Relief.

(*Id*., p. 221)

On appeal to the Tennessee Court of Criminal Appeals, Cone argued that the trial court erred by failing to hold an evidentiary hearing on the issue of waiver, particularly in view of his December 1993 affidavit, which he contended showed "there was no knowing and understanding waiver of the claims advanced in the successive petition for post-conviction relief." (R. 4, Add. 4, Doc. 3, pp. 12-13) Cone challenged the trial court's finding that certain claims

had been previously determined, in particular, the new elements of his ineffective assistance of counsel claim and his claim that the trial court's jury charge violated the burden-shifting prohibition addressed in *Sandstrom v. Montana*, 442 U.S. 510 (1979). Cone did not identify the *Brady* claim as an issue of any particular note or present any specific argument regarding the substance of that claim; he did not challenge the trial court's ruling on grounds that the items comprising his *Brady* claim had only become available to him after his first post-conviction proceeding had concluded. In fact, Cone's only mention of the claim in his principal brief before the Tennessee Court of Criminal Appeals came in a passing reference to paragraph number 35 (among 18 others) within a quotation from the trial court's order. (*Id*., pp. 15-16) Cone's reply brief asserted, without further elaboration, that his claims of ineffective assistance of counsel and withholding of exculpatory evidence "ha[d] not been waived" and warranted an evidentiary hearing. (R. 4, Add. 4, Doc. 4, p. 5)

The Tennessee Court of Criminal Appeals declined to address the merits of any of Cone's claims, affirming the trial court's determination that "all of the issues raised by the appellant's amended second petition were either previously determined or waived." *Cone v. State*, 927 S.W.2d 579, 580 (Tenn. Crim. App.), *cert. denied*, 519 U.S. 934 (1996). Not surprisingly, the state appellate court's opinion did not address the *Brady* claim, focusing instead on Cone's failure to overcome the presumption of waiver as to those claims raised for the first time in the

second post-conviction proceeding. After addressing each of Cone's arguments, the court of criminal appeals concluded that he had "failed to rebut the presumption of waiver as to all claims raised in his second petition for post-conviction relief which had not been previously determined," and affirmed the judgment of the trial court. *Cone*, 927 S.W.2d at 582.

3. Cone sought federal habeas relief in July 1997, asserting numerous grounds, including a claim that the prosecution withheld exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), set forth in paragraph 39(a)-(k) of his petition. (R. 71, pp. 12-17) (J.A. 24-30) The district court denied Cone's petition for writ of habeas corpus, finding in pertinent part that Cone had procedurally defaulted those claims raised for the first time in his second petition for post-conviction relief. As to Cone's *Brady* claim, the district court specifically addressed each item cited by Cone and concluded, alternatively, that they were either procedurally defaulted or meritless. (Pet. App. 112a-119a)

On March 22, 2001, a unanimous panel of the United States Court of Appeals for the Sixth Circuit affirmed the district court's judgment with respect to Cone's *Brady* claim, concluding, "[W]e believe that Cone's [*Brady*] claims are procedurally defaulted and that he cannot show cause and prejudice to overcome the default. *And even if that were not so, we are satisfied that the documents Cone complains were withheld were not* Brady *material*." *Cone v. Bell*, 243 F.3d 961, 968 (6th Cir. 2001) (emphasis added). However, the Sixth Circuit reversed and remanded

the case to the district court with instructions to issue a writ of habeas corpus vacating Cone's death sentences due to ineffective assistance of counsel at sentencing. *Cone v. Bell*, 243 F.3d 961 (6th Cir. 2001). This Court granted Warden Bell's petition for writ of certiorari and, on May 28, 2002, reversed the decision of the Sixth Circuit, and remanded the case for further proceedings consistent with its opinion. *Bell v. Cone*, 535 U.S. 685 (2002) (*Cone I*). Cone did not petition this Court for review of the Sixth Circuit's 2001 determination of the *Brady* claim, although it was then ripe for review.

On remand, the Sixth Circuit again reversed the district court with instructions to issue a writ of habeas corpus vacating Cone's death sentences, this time finding that the trial court's instructions to Cone's jury on the "heinous, atrocious or cruel" aggravating circumstance were unconstitutionally vague. *Cone v. Bell*, 359 F.3d 785 (6th Cir. 2004). Again, this Court reversed and remanded the case with instructions for "further proceedings consistent with [its] opinion." *Bell v. Cone*, 543 U.S. 447, 460 (2005) (per curiam) (*Cone II*).

In 2005, after this Court's second remand, Cone sought to revive his original *Brady* claim, arguing that *Banks v. Dretke*, 540 U.S. 668 (2004), established the "exceptional circumstances" necessary to avoid application of the law-of-the-case doctrine that would ordinarily have precluded reconsideration of the 2001 decision rejecting the *Brady* claim. The Sixth Circuit refused to revisit its earlier decision, however, concluding that "[w]e do not find any such [exceptional]

circumstance" in this case. *Cone*, 492 F.3d at 755. (Pet. App. 23a) The court further noted that, "[e]ven if we were disposed to ignore our prior decision on this issue," Cone's *Brady* claim is without merit:

> We said this before in *Cone*, 243 F.3d at 968-70, and we now say it again. A review of the allegedly withheld documents shows that this evidence would not have overcome the overwhelming evidence of Cone's guilt in committing a brutal double murder and the persuasive testimony that Cone was not under the influence of drugs. . . . It would not have been news to the jurors that Cone was a "drug user." They had already heard substantial direct evidence that he was a drug user, including the opinion of two expert witnesses, the testimony of Cone's mother, drugs found in Cone's car, and photographic evidence. Despite this evidence, the jurors concluded that Cone's prior drug use did not vitiate his specific intent to murder his victims and did not mitigate his culpability sufficient to avoid the death sentence. In short, the allegedly withheld evidence catalogued by the dissent does not "undermine confidence in the verdict because there is [not] a reasonable probability that there would have been a different result had the evidence been disclosed," . . . and so we reject Cone's *Brady* claims.

(Pet. App. 25a-26a)

SUMMARY OF THE ARGUMENT

The Sixth Circuit correctly found that Cone procedurally defaulted his *Brady* claim because the state courts declined to review the merits on state procedural grounds. Cone presented a *Brady* claim for the first time in his second state post-conviction proceeding. Under Tennessee law, there is a rebuttable presumption that a ground for relief not raised in prior post-conviction proceedings or on direct appeal is waived. The post-conviction court dismissed Cone's *Brady* claim on the erroneous ground that it had been "considered and denied" on direct appeal or in the first post-conviction proceeding. On appeal, however, the Tennessee Court of Criminal Appeals affirmed the lower court's judgment after concluding that Cone had "failed to rebut the presumption of waiver as to all claims raised in his second petition for post-conviction relief which had not been previously determined." *Cone*, 927 S.W.2d at 582. It did not otherwise address the lower court's finding as to the *Brady* claim. The record plainly shows that Cone did not present his *Brady* claim on direct appeal or in his first post-conviction proceeding, nor did the state courts adjudicate the merits of the claim in either of those proceedings. Thus, Cone's contention that a claim that has been "previously determined" by the state courts cannot be procedurally defaulted in federal habeas is inapposite on this record. The state appellate court's waiver determination encompasses Cone's *Brady* claim and substantiates the Sixth Circuit's finding of default.

Cone's alternate effort to challenge the *correctness* of the state court's waiver determination comes too late. He could have and should have directed his concerns to the state appellate court but failed to do so. To reject a state court's judgment as erroneous for reasons never presented to the state court in the first place is contrary to the notions of comity and federalism that drive federal habeas jurisprudence, and this Court should decline Cone's invitation that it do so in this case. The Court should also make clear that the adequacy of a state procedural bar for purposes of procedural default in federal habeas proceedings does not equate to an assessment of its correctness in a particular case. A federal habeas court does not sit as a super appeals court in matters of state law and may not reject an otherwise adequate state procedural bar based upon its view that the state court applied it erroneously in a particular case.

The Sixth Circuit's holding that the evidence in question is, in any event, immaterial under *Brady v. Maryland*, 373 U.S. 83 (1963), independently justifies affirmance of the judgment below. To justify relief under *Brady*, the allegedly withheld evidence must place the "whole case" in a different light. *Kyles v. Whitley*, 514 U.S. 419, 425 (1995). The evidence on which Cone relies – consisting primarily of hearsay contained in police teletypes issued during a police search for Cone after he had evaded capture following a foiled robbery of a jewelry store and references to unspecified "psychological problems" – says nothing about his mental state at the time of the

murders and does not impeach the testimony of any of the numerous witnesses who observed him during the relevant period. The jury heard substantial evidence of Cone's drug use, and the defense presented two mental health experts to substantiate his mental health defense. The fact that witnesses described Cone as "wild-eyed" while he was fleeing police after the jewelry heist and the commission of two separate shootings reveals nothing that would have materially advanced his defense. Nor does any of the evidence in question impeach the testimony of state witnesses describing Cone's demeanor and appearance in the days after the murders. The prosecution destroyed Cone's defense at trial not by showing that Cone was not a drug addict, but by pointing to the most compelling evidence of Cone's mental state – his own words and actions in the period surrounding the murders, a fact emphasized by the prosecutor in closing argument: "Look at the facts of what Mr. Cone did on Saturday and Sunday to go to his mental attitude. He wasn't drug crazy. He is a robber and a killer. Simple as that." (R. 4, Add. 1, Vol. 18, pp. 2023-24) None of the evidence Cone now contends is exculpatory materially undermines that evidence. The significance of the evidence on which Cone relies is overblown and does not approach the level of materiality required for *Brady* purposes. The Sixth Circuit's judgment should be affirmed.

ARGUMENT

I. CONE'S *BRADY* CLAIM IS PROCEDURALLY DEFAULTED.

Cone argues that the Sixth Circuit erred in holding his *Brady* claim to be procedurally defaulted after it had been "twice presented" to the state courts. This is so, he contends, because the state court's application of a bar to re-litigation shows that the petitioner, in fact, gave the state courts a *second* opportunity to right the alleged wrong and thus could not have defaulted the claim. (Pet. Br. 23-29) Cone's argument is sophistry. The record plainly shows, and Cone himself admits, that he did *not* "twice present" his *Brady* claim to the state courts. (Pet. Br. 29) Cone presented a *Brady* claim to the state courts for the first time in a second or subsequent petition for post-conviction relief. But the state courts rejected the claim on procedural grounds, concluding that a merits review was barred under state law. The state court's judgment rested on state law grounds that were both independent of federal law and adequate to sustain the judgment. Under these circumstances, the Sixth Circuit correctly concluded that Cone procedurally defaulted his *Brady* claim: "The independent and adequate state ground in this instance is the state court's finding that Cone's claims were previously determined *or* waived under Tenn. Code Ann. § 40-30-112 (1990)." *Cone*, 243 F.3d at 969 (emphasis added). (Pet. App. 59a) And, because Cone cannot meet the cause-and-prejudice showing necessary to avoid the default, the court was correct in

affirming the judgment of the district court dismissing his petition for a writ of habeas corpus.

A. The state appellate court refused to review the merits of Cone's *Brady* claim, presented for the first time in his second post-conviction petition, on the basis of a state statutory procedural bar.

A habeas petitioner is required to exhaust state remedies by presenting the substance of his constitutional claim to the state courts prior to seeking federal habeas relief. 28 U.S.C. § 2254(b). The exhaustion doctrine is grounded in principles of comity and federalism and is designed to ensure that the States have the first opportunity to correct alleged violations of a prisoner's federal rights. *Coleman v. Thompson*, 501 U.S. 722, 731 (1991). To that end, a habeas petitioner must fairly present his claims in each appropriate state court for consideration before seeking federal relief. *Baldwin v. Reese*, 541 U.S. 27, 29 (2004); *Duncan v. Henry*, 513 U.S. 365, 365 (1995). Exhaustion principles also require that a petitioner comply with the State's procedural requirements for presenting his federal claims. *Coleman*, 501 U.S. at 732.

In general, a federal court may not consider an issue of federal law arising from a judgment of a state court "if that judgment rests on a state-law ground that is both 'independent' of the merits of the federal claim and an 'adequate' basis for the [state] court's

decision." *Harris v. Reed*, 489 U.S. 255, 260 (1989). Although the doctrine originated in the direct-review context, it also extends to federal habeas corpus proceedings to bar review when a state court declines to address a petitioner's claims because he failed to meet a state procedural requirement. *Coleman*, 501 U.S. at 729-30; *Wainwright v. Sykes*, 433 U.S. 72, 81-82 (1977). When Cone presented a *Brady* claim for the first time in his second post-conviction proceeding, the state court denied relief on the basis of a state procedural ground. The post-conviction court declined to address the merits of any of the claims raised in that proceeding after finding that "the grounds stated in the Petition as amended have been either previously determined or presumptively waived as a matter of law." (R. 4, Add. 3, Doc. 1, p. 232) The post-conviction court also specifically held that Cone had failed to overcome the statutory presumption of waiver as to those claims raised for the first time in Cone's second post-conviction proceeding. (*Id*. at 234) On appeal, the Tennessee Court of Criminal Appeals affirmed the post-conviction court's judgment, holding that Cone "failed to rebut the presumption of waiver as to all claims raised in his second petition for post-conviction relief which had not been previously determined." *Cone*, 927 S.W.2d at 582. The Tennessee Court of Criminal Appeals, the last state court rendering an opinion on Cone's federal claims, thus applied a state procedural bar as to all of the claims raised in that action, including the *Brady* claim, that precluded federal habeas review. *See, e.g.*, *Coleman,* 501 U.S. at 739.

The state appellate court's opinion is properly read as applying the procedural bar of waiver as to all claims raised for the first time in Cone's second post-conviction petition, including the *Brady* claim.[6] While it is true that the state post-conviction trial court erroneously listed the *Brady* claim among those "considered and denied" on direct appeal or in the first post-conviction action (R. 4, Add. 3, Doc. 1, pp. 234, 236), the state appellate court's opinion does not embrace, or even address, that incorrect finding. Indeed, because the state appellate court concluded that Cone had failed to overcome the statutory presumption of waiver as to any and all new claims, there was simply no need for the court to distinguish between claims that had been raised and rejected in prior proceedings and those raised for the first time in the second post-conviction petition.[7] Both categories of claims were procedurally barred and thus had

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[6] Tenn. Code Ann. § 40-30-112(b) (1990) provides:

> (1) A ground for relief is "waived" if the petitioner knowingly and understandingly failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented.
>
> (2) There is a rebuttable presumption that a ground for relief not raised in any such proceeding which was held was waived.

[7] "A ground for relief is 'previously determined' if a court of competent jurisdiction has ruled on the merits after a full and fair hearing." Tenn. Code Ann. § 40-30-112(a) (1990).

properly been dismissed by the lower court.[8] The waiver bar erected by the state appellate court extended to "all claims in [Cone's] second petition for post-conviction relief which had not been previously determined." *Cone*, 927 S.W.2d at 582. Cone's *Brady* claim unquestionably falls within that class of claims.[9]

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[8] The scope of any hearing under Tennessee's Post-Conviction Procedure Act "shall extend to all grounds that petitioner may have, except those grounds which the court finds should be excluded because they have been waived or previously determined, as herein defined." Tenn. Code Ann. § 40-30-111 (1990).

[9] Because it is beyond dispute that Cone never presented a *Brady* claim to the state courts until he filed his second post-conviction petition, as amended, Cone's reliance upon footnote 3 of this Court's opinion in *Ylst v. Nunnemaker*, 501 U.S. 797 (1991), is unavailing (indeed, it is mystifying). In *Ylst*, the Court presumed that a later state court order rejecting a prisoner's federal claim without explanation in fact rested on the application of a state-law procedural bar, because the last reasoned state-court judgment in the case had expressly rejected the claim on the basis of such a bar. *Ylst*, 501 U.S. at 805-06. In footnote 3, the Court distinguished the situation where an unexplained state-court order in fact rests upon a prohibition against further merits review of a claim already considered and rejected by the state courts. In that circumstance, the Court reasoned, a federal habeas court is not precluded from reviewing the claim; instead, it may "look through" the latter, unexplained order, to the earlier merits determination contained in the last reasoned state-court judgment deciding the claim. *Ylst*'s footnote 3 obviously has no application to Cone's case. Cone raised his *Brady* claim for the first time in his second post-conviction petition; the last reasoned state-court judgment in the case expressly rejects all claims raised for the first time in the second petition on the basis of the state procedural bar of waiver; and,

(Continued on following page)

Cone argues in this Court that his *Brady* claim, in fact, was properly before the post-conviction court, *i.e.*, that the state court's application of the procedural bar was erroneous. He contends that the allegedly exculpatory materials in question were not reasonably available to him until after his first post-conviction proceeding, at which time he first gained access to the district attorney's case file. (Pet. Br. 29-30) These assertions are misdirected and come too late. Cone had an opportunity to address this very argument to the state courts to overcome the statutory presumption of waiver but failed to do so during his second post-conviction proceeding. The various amendments to his second post-conviction petition make no mention of the availability of the district attorney's case file. In fact, Cone's haphazard pleadings in the post-conviction court point virtually everywhere but there. *See id.* at 14-19. The sole reference in Cone's filings in the post-conviction trial court regarding the district attorney's case file came in a single sentence buried in a 41-page affidavit submitted in December 1993. But Cone did not press that point in his appeal to the Tennessee Court of Criminal Appeals. In fact, he presented no argument or authority in that court at all regarding a *Brady* claim, let alone explain the genesis of that claim in

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accordingly, even if a federal habeas court were to "look through" that judgment in search of an earlier state-court merits disposition of the *Brady* claim, there is nothing on the other side to find, because Cone had never raised such a claim at any earlier stage of the case.

order to overcome the post-conviction court's judgment.[10] The rules of the Tennessee Court of Criminal Appeals require that issues raised in that court be supported by argument, citation to authorities and appropriate references to the record. Tenn. R. Crim. App. 10(b). It is not obligated to search for needles in a haystack, particularly on a point not even pressed before it.[11] *Cf. Smith v. Duncan*, 411 F.3d 340, 345 (2d Cir. 2005) (appellate court has no obligation to "look

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[10] By contrast, Cone presented extensive argument in the Tennessee Court of Criminal Appeals on his ineffective assistance of counsel and *Sandstrom* claims. *See id.* at 20-21. Cone's failure to assert his claim in the Tennessee appellate courts reveals yet another reason to uphold the Sixth Circuit's default determination. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999) (state prisoners must give state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's appellate review process). *Cf. Baldwin*, 541 U.S. at 32 (a state prisoner does not "fairly present" a claim to a state court if that court must read beyond a brief or other document that does not alert it to the presence of a federal claim in order to find material that does).

[11] Cone first articulated an argument regarding the waiver of his *Brady* claim in his Application for Permission to Appeal to the Tennessee Supreme Court under Tenn. R. App. P. 11, which provides for a discretionary appeal from a final decision of the Tennessee Court of Appeals or Court of Criminal Appeals. (R. 4, Add. 4, Doc. 8) Failure to raise or brief an issue before the trial court or intermediate appellate court is ground for waiver of review in the Tennessee Supreme Court. *Alexander v. Armontrout*, 24 S.W.3d 267, 273 n.9 (Tenn. 2000). *See also* Tenn. R. App. P. 36(a) ("Nothing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error.").

for a needle in a paper haystack"); *Mallory v. Smith*, 27 F.3d 991, 995 (4th Cir. 1994) (the exhaustion requirement demands that a state prisoner do more than "scatter some makeshift needles in the haystack of the state court record"). Cone invites this Court to ignore the judgment of the state court for reasons that were never presented to that court in the first place, a result that flies in the face of all notions of comity and federalism.

B. The state procedural ground both independently and adequately supports the state court's judgment.

Cone argues that this Court is obligated to determine whether a procedural bar was "correctly" applied by a state court. (Pet. Br. 31) He is mistaken. It is true that a federal court may conduct an independent assessment of "when and how defaults in compliance with state procedural rules can preclude [a federal court's] consideration of a federal question." *Henry v. Mississippi*, 379 U.S. 443, 447 (1965). Indeed, a federal court must ascertain for itself "whether the asserted non-federal ground independently and adequately supports the judgment." *Michigan v. Long*, 463 U.S. 1032, 1038 (1983). But, given the interests of comity and federalism, the Court has generally upheld a procedural ground as adequate where the defendant has notice of the rule, *i.e.*, the procedure is firmly established and regularly followed, and the State has a legitimate interest in its enforcement. For example, in *Henry*, the Court

considered the question of the adequacy of a state procedural ground to bar review by the Court on direct appeal, concluding that the failure to comply with a state contemporaneous-objection rule as to the admission of evidence did not necessarily bar federal review of the underlying Fourth Amendment claim. The state procedural rule would be "adequate" where "the State's insistence on compliance with its procedural rule serves a legitimate state interest." *Henry,* 379 U.S. at 446. Because the purposes of the rule in *Henry* were largely served by another procedural avenue, the Court concluded that enforcement of the contemporaneous-objection rule was less essential and thus inadequate to deprive the Court of jurisdiction on direct review. *See also Johnson v. Mississippi*, 486 U.S. 578, 587 (1988) (state procedural bar inadequate where it had not been "consistently or regularly applied" in the past); *James v. Kentucky*, 466 U.S. 341, 346 (1984) (state procedural rule disregarded by federal court where the rule "not always clear or closely hewn to"); *Wolfe v. North Carolina*, 364 U.S. 177, 196 (1960) (appeal dismissed for lack of jurisdiction where state supreme court declined to decide federal question because of state procedural rules that were "clearly delineated and even-handedly applied"); *Staub v. Baxley*, 355 U.S. 313, 320 (1958) (state procedural bar inadequate where its application would force "an arid ritual of meaningless form" and its strict application was contrary to a "long line" of Georgia rulings). The Court has also refused to give effect to a state court's application of a procedural rule when its application is "exorbitant" and the

State's interests are otherwise substantially met, *Lee v. Kemna*, 534 U.S. 362, 376, 387 (2002), where a defendant was not fairly apprised of the rule's existence, *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457 (1958), and where the state procedure imposes "unnecessary burdens" on a litigant's federal rights. *Brown v. Western Railway Co.*, 338 U.S. 294, 298 (1949). None of these conditions is present in this case.

Nevertheless, Cone urges this Court to enter new territory – to reject an otherwise adequate state procedural bar because its application by the state court was allegedly erroneous under the particular circumstances of a case. In *Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36, 42 (1944), the Court stated that it will not inquire whether the rule applied by the state court is right or wrong, or substitute its own view of what should be deemed the better rule for that of the state court especially where there is "fair support" for the non-federal basis for the decision and "no evasion of the constitutional issue" by a state court. By contrast, Cone would have this Court directly oversee a state's application of its own procedures governing the presentation of a federal claim, a clear departure from precedent and one that is contrary to the principles of federalism underlying the Court's habeas corpus jurisprudence. The rule Cone advances would, in fact, impose greater federal court scrutiny over a state court's application of its own procedural rules than is permitted under the habeas statute for review of a merits determination of

a constitutional claim. 28 U.S.C. § 2254(d)(1). *Williams v. Taylor*, 529 U.S. 362, 411 (2000) ("[A] federal court may not issue the writ simply because that court concludes in its independent judgment that the relevant state court decision applied clearly established law erroneously or incorrectly."). And it would serve no legitimate purpose given the procedural safety valve already in place that permits federal review of procedurally defaulted claims where a prisoner can show cause for his state-court default and actual prejudice from the alleged federal-law violation or that the failure to review the claim would result in a fundamental miscarriage of justice. *Murray v. Carrier*, 477 U.S. 478 (1986); *Schlup v. Delo*, 513 U.S. 298 (1995).

Procedural rules are just as much a product of State sovereignty as the substantive laws they implement. *Lee*, 534 U.S. at 395 (Kennedy, J., dissenting). Cone's proposed rule tramples the significant State interests served by those rules and the state-court oversight he seeks disrespects the State's legitimate efforts to enforce them.

The state court's application of a procedural bar in Cone's case reflects the longstanding requirement under Tennessee law that a petitioner must present constitutional claims at the earliest possible opportunity. Tennessee's Post-Conviction Procedure Act, enacted in 1967, is a comprehensive scheme for litigating alleged constitutional violations. Under the Act:

> Relief shall be granted when the conviction is void or voidable because of the abridgement

> in any way of any right guaranteed by the constitution of this state or the Constitution of the United States including a right that was not recognized as existing at the time of the trial if either constitution requires retrospective application of that right.

Tenn. Code Ann. § 40-30-105 (1990).

The scope of any hearing under the Act extends to all grounds the petitioner may have, except those grounds which the state court finds should be excluded because they have been "waived or previously determined." Tenn. Code Ann. § 40-30-111 (1990). There is a rebuttable presumption that a ground for relief not raised in prior proceedings under the Act or on direct appeal is waived. Tenn. Code Ann. § 40-30-112 (1990). The waiver provision was added in 1971 with the aim of codifying the judicial construction already in place and to underscore the significant state interest in the finality of criminal judgments, which is severely eroded by delayed and/or piecemeal litigation. *House v. State*, 911 S.W.2d 705, 709-10, 713-14 (Tenn. 1995) (citing *McCleskey v. Zant*, 499 U.S. 467, 491 (1991) ("[p]erpetual disrespect for the finality of convictions disparages the entire criminal justice system")). The burden is on the petitioner to overcome the statutory presumption of waiver. *Id.* By placing the burden on a petitioner to demonstrate why his claim is properly before the post-conviction court, the law balances the State's interests in the finality of its criminal judgments with the rights of a defendant to a reasonable opportunity to assert his federal rights.

The Tennessee Court of Criminal Appeals initially reversed and remanded the post-conviction court's summary dismissal of Cone's uncounseled successive post-conviction petition because he had not been given an opportunity to rebut the presumption of waiver. *Cone*, No. 48, 1991 WL 77535, at *1. *See id.* at 12-13. Thus, Cone was unquestionably on notice of this procedural requirement. And, because Cone made no effort in the Tennessee Court of Criminal Appeals to overcome the presumption of waiver he knew existed as to his *Brady* claim or even to alert that court to the substance of his claim, *see id.* at 20-21, the procedural bar constitutes an adequate basis to support the state-court judgment.

C. Cone cannot demonstrate cause for the default and actual prejudice resulting from the state court's refusal to review the merits of the *Brady* claim.

Cone's state-court default would not leave him without recourse in the federal courts if he could show cause and prejudice. An adequate and independent finding of default will bar federal habeas review of a federal claim unless the habeas petitioner can show cause for the default and actual prejudice as a result of the alleged violation of federal law. *Coleman*, 501 U.S. at 750. However, the Sixth Circuit found in 2001 that Cone had "further defaulted" by failing to advance any argument before that court on the cause-and-prejudice question. *Cone*, 243 F.3d at

971. In his most recent journey to that court, Cone argued that this Court's decision in *Banks* excused any state-court default and justified reconsideration of the 2001 decision. *Cone*, 492 F.3d at 753-54. The Sixth Circuit correctly rejected Cone's argument, reiterating its earlier determination that Cone's *Brady* claim was, in any event, meritless. The cause-and-prejudice question is not fairly included in either of the questions accepted for review in this Court, both of which focus on the narrow question of the preclusive effect of the state court's procedural determination; it is thus outside the scope of the issues that may be addressed in this Court. *See* Sup. Ct. R. 14.1 (a) ("Only questions set forth in the petition, or fairly included therein, will be considered by the Court."). In any event, because the prejudice component necessary to avoid a procedural default coincides with the materiality element of *Brady,* the Sixth Circuit's merits determination, as we now show, properly disposed of both questions. *Strickler v. Greene*, 527 U.S. 263, 282 (1999) (Unless suppressed evidence is "material for *Brady* purposes, [its] suppression [does] not give rise to sufficient prejudice to overcome [a] procedural default."); *Banks v. Dretke*, 540 U.S. 668, 698 (2004) (same).

II. CONE'S *BRADY* CLAIM, EVEN IF NOT DEFAULTED, IS WITHOUT MERIT.

The 2001 and 2007 opinions of the Sixth Circuit plainly demonstrate that the court of appeals' decision did not rest solely on procedural default grounds.

Rather, in *both* instances, the court expressly rejected Cone's claim on the merits, concluding that the documents in question were not material for *Brady* purposes and thus provided no basis for relief regardless of whether Cone had fairly presented the claim during his state post-conviction proceeding. (Pet. App. 17a-26a, 56a-64a) On this point, Cone persists in the view that the Sixth Circuit's merits determination was mere *dicta*. However, to the extent the language employed in the 2001 opinion raised questions about the court's intent, all doubt was surely resolved in 2007, with the court's pointed reference to its "alternative holding" in 2001 and its explicit rejection of Cone's *Brady* claim. *Cone*, 492 F.3d at 753, 757. The court's alternative merits finding was appropriate under 28 U.S.C. § 2254(b)(2), which empowers a federal court to deny a writ of habeas corpus on the merits notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State. *See Bell v. Cone*, 543 U.S. 447, 451 n.3 (2005) (addressing merits of claim notwithstanding question concerning procedural default).

To establish a *Brady* violation, a petitioner must prove that: (1) the evidence was favorable to the accused either because it is exculpatory or because it is impeaching; (2) the prosecution suppressed the evidence; and (3) the evidence was material to either guilt or punishment. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999); *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The prosecutor is not required to deliver his entire file to defense counsel or even to disclose all

evidence favorable to the accused "no matter how insignificant," *United States v. Bagley*, 473 U.S. 667, 676 (1985). A new trial is not automatically required whenever "a combing of the prosecution's files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict." *Giglio v. United States*, 405 U.S. 150, 154 (1972) (quoting *United States v. Keogh*, 391 F.2d 138, 148 (2d Cir. 1968)). Instead, a constitutional violation occurs only when the omission "deprived the defendant of a fair trial." *United States v. Agurs*, 427 U.S. 97, 108 (1976). Evidence is material for *Brady* purposes when "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 435 (1995).

Cone argues that the evidence in question supported his contention at trial that he was a drug user and was acting under the influence of drugs at the time of the murders. However, given the overwhelming evidence of guilt, the materials in question would have done nothing to undermine the State's case or even credibly impeach any of the witnesses at trial. It is true that Cone offered a "single defense" that, at the time of the murders, he was acting under a drug-induced psychosis that prevented him from forming the requisite mens rea for first-degree murder, but the evidence in question does not materially advance that defense. On its face, the evidence says nothing about Cone's mental state at the time of the crime and does not impeach the testimony of any of the

numerous witnesses who observed Cone in the period surrounding the murders.

Moreover, none of the information contained in the materials in question was particularly revelatory. The jury heard substantial evidence of Cone's drug use, including the testimony of two expert witnesses and his mother. Dr. Jonathan Lipman outlined for the jury, in detail, the information Cone had reported to him concerning his drug habits and patterns, including Cone's statements that he had multiple daily amphetamine injections. (R. 4, Add. 1, Doc. 1, Vol. 16, pp. 1729-37) The proof at trial showed that, at the time of the offense, Cone was in possession of a significant variety and quantity of narcotics and other controlled substances. *See id.* at 4-5. There was unrebutted testimony at trial that Cone's drug use began while he was serving in the Army, first in Germany, then in Vietnam, where he claimed to have been issued amphetamines for 53 consecutive nights to maintain his alertness while on guard duty. FBI Agent Flynn recounted Cone's admission that he used cocaine, dilaudid, and demerol, as well as Cone's assertion that he was suffering from drug withdrawal on August 14, 1980, four days after the murders. (R. 4, Add. 1, Doc. 1, Vol. 17, p. 1915)

Two expert witnesses testified in support of Cone's mental health defense. The first, Dr. Matthew Jaremko, testified that Cone suffered from a substance-abuse disorder and post-traumatic stress disorder, which rendered him incapable of conforming his conduct to the requirements of the law. (R. 4, Add.

1, Doc. 1, Vol. 15, pp. 1670, 1674-75) Dr. Lipman testified that Cone suffered from chronic amphetamine psychosis, which prevented him from knowing the wrongfulness of his acts and rendered him incapable of conforming his conduct to the requirements of the law in August 1980. (R. 4, Add. 1, Doc. 1, Vol. 16, p. 1758)

Cone argues that multiple law enforcement teletypes issued while Cone was at large after evading arrest for the jewelry store robbery, which described the suspect of that robbery as a "heavy drug user," substantially corroborated Cone's defense and seriously undercut the testimony of state witnesses. (Pet. Br. 42-44) However, given the overwhelming evidence of guilt at trial, the materials in question would have done little, if anything, to reinforce Cone's defense. The jury knew that police had recovered a huge quantity of drugs and drug paraphernalia from Cone's abandoned car. *See id.* at 4-5. They had heard the testimony of Dr. Lipman concerning Cone's alleged drug use as well as Cone's mother, Valeree Cone, who testified that Cone had "changed" after his military discharge and that he had received a package of marijuana shipped from Vietnam. (R. 4, Add. 1, Doc. 1, Vol. 15, pp. 1634-44, 1647) Fugitive reports provided to law enforcement agencies across the country that were issued during the search for Cone after he had evaded capture – describing him both as a drug user and "armed and dangerous" – reveal little more than cautious police work in the course of a rapidly unfolding and obviously very dangerous

situation and would hardly be surprising to the jury, given that the advisories were issued *before* Cone's arrest on August 14, 1980. The fact that witnesses described Cone as "wild-eyed" while he was fleeing police likewise reveals nothing that would have materially advanced his defense – he was being hotly pursued by multiple law enforcement officers in patrol cars, on foot, and by helicopter after a foiled jewelry heist and the commission of two separate shootings. Who, in that circumstance, would appear serene?

None of these items, individually or collectively, materially undermines the State's case or materially advances Cone's defense. Contrary to Cone's contentions, the evidence in no way impeaches the testimony of Sergeant Ralph Roby that he observed no needle marks on Cone's body when he saw him on August 18, 1980. (R. 4, Add. 1, Doc. 1, Vol. 17, p. 1939-40) In fact, to the extent there may have been any question on that point, the jury had for themselves a photograph of Cone and Sergeant Roby that was taken at that time. (R. 4. Add. 1, Doc. 1, Vol. 14, pp. 1515-16, Vol. 21, Exh. 63)

The testimony of FBI Agent Flynn, which concerned his observations of Cone's demeanor when he observed him on August 14, 1980, is also unscathed. His testimony that Cone was mentally alert, provided details of his recent travels, and exhibited no signs of a mental disease or defect is in no way inconsistent with any of the FBI alerts Cone now insists were "exculpatory." Moreover, Agent Flynn never testified

that Cone was not a drug user; to the contrary, he recounted for the jury Cone's admission that he used cocaine, dilaudid, and demerol. (R. 4, Add. 1, Doc. 1, Vol. 17, p. 1916)

Cone's arguments regarding Ilene Blankman are even more farfetched. He contends that documents showing that she "received unusual attention and treatment" by law enforcement officers – by being escorted by law enforcement from Florida to Tennessee for trial – and that the prosecution was "unusually solicitous" of her testimony would have undermined her credibility at trial. (Pet. Br. 45) But defense counsel specifically cross-examined Blankman about allegedly inconsistent or incomplete prior statements, including the absence in her previous statement to police that she observed no needle marks. (R. 4, Add. 1, Doc. 1, Vol. 17, p. 1903) The jury also knew, through defense counsel cross-examination, that Blankman had been escorted to the Tennessee trial by a law enforcement officer.[12] (R. 4, Add. 1, Doc. 1, Vol. 17, p. 1906) Neither Roby, Flynn, nor Blankman testified that Cone was not a drug user; rather, each of the witnesses confined their testimony to their observations of Cone in the days after the murders, during which time they did not observe him use drugs, and he did not appear to be under the influence.

[12] Indeed, contrary to Cone's assertions here, review of defense counsel's cross-examination calls into question the suggestion that the materials at issue were withheld at all.

Cone's contentions about the significance of the evidence he catalogues is overblown and devoid of merit. Even if the jury had had additional, independent evidence of Cone's drug use, his own words and actions defeated his claim of insanity, a fact emphasized by the prosecutor in closing argument: "Look at the facts of what Mr. Cone did on Saturday and Sunday to go to his mental attitude. He wasn't drug crazy. He is a robber and a killer. Simple as that." (R. 4, Add. 1, Doc. 1, Vol. 18, pp. 2023-24) The jewelry store robbery involved careful planning. The day before the robbery, Cone stole a Tennessee license plate. (R. 4, Add. 1, Doc. 1, Vol. 13, pp. 1350-51; Vol. 14, pp. 1496-97) He cased the store under the ruse of shopping for an engagement ring, so that he could identify a case containing high-priced jewelry, requesting of the store manager to see a particular size and shape of diamond, as well as a particular, very expensive watch, and speaking knowledgeably with the manager about diamonds before displaying his weapon. (R. 4, Add. 1, Doc. 1, Vol. 11, pp. 973-75) In the course of the robbery, Cone had the presence of mind to tell one of the store customers, "Don't worry, I'm not about to panic over this." (R. 4, Add. 1, Doc. 1, Vol. 11, p. 1014, 1017) He changed his clothing after the robbery to avoid detection. (R. 4, Add. 1, Doc. 1, Vol. 14, pp. 1496-97, 1501)

After evading police, Cone again displayed command of his behavior and mental faculties when he attempted to gain entry into the home of Lucille Tuech, a neighbor of the Todds. Again, he employed a calculated ruse when he asked Mrs. Tuech if "the

Manleys" lived in the building and then asked to use her telephone. When she refused his request, Cone brandished a pistol. But Mrs. Tuech quickly slammed the door in his face, ran to another part of the house, and called the police. (R. 4, Add. 1, Doc. 1, Vol. 12, pp. 1206-08)

After brutally murdering the helpless, elderly Todds – not because he was out of his mind, but, by Cone's own admission, because they "ceased to cooperate" with him (R. 4, Add. 1, Doc. 1, Vol. 15, p. 1681) – Cone moved their bodies to positions in the house not visible from the outside, callously rummaged through the Todds' belongings looking for money, altered his appearance by shaving his beard, and booked a flight to Key West, Florida, where he assumed the alias "Gerald Mason Harmon" to avoid detection. Within days of the murders, Cone studied for and took written and driving tests to obtain a replacement driver's license under the Harmon alias. FBI Agent Flynn described him at that time as mentally alert, able to give details of his recent travels, and aware of his surroundings. Two mental health experts testified at trial that Cone was not suffering from any mental disease or defect and had the capacity to conform his conduct to the requirements of the law and to appreciate the wrongfulness of his conduct.

In short, the evidence Cone claims was withheld in no way undermines the jury's verdict. It impeaches no witness and proves nothing. To justify relief under *Brady*, the evidence in question must place the "whole case" in a different light. *Kyles,* 514 U.S. at

435. The evidence here comes nowhere near meeting that standard. The Sixth Circuit correctly rejected Cone's *Brady* claim, and its holding independently justifies affirmance of the judgment below.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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